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conducting of a public garage for "storing, maintenance, keeping, caring for or repairing of automobiles or motors" was held not to prohibit the erection of a building which although adapted to such use could be used otherwise.¹⁶

In *People v. Ericsson*, *supra*, the rule is laid down as follows:

"The power of the Legislature to regulate such a business is in no way dependent upon the question whether it is a nuisance *per se*. It is of such a character that it becomes a nuisance when conducted in particular localities and under certain conditions, and it is clearly within the province of the Legislature, in the exercise of police power, to authorize the municipalities of the state to direct the location of public garages."

This seems to be a good rule and is followed very consistently.

The general view that courts take with regard to garages may be better understood by giving a few examples of injunctions granted to prevent the erection of garages. In *Prendergast v. Walls*,¹⁷ an injunction was granted to restrain the erection of a garage in the center of an exclusively residential district in close proximity to several churches and a parochial school, on the grounds that "the maintenance of a public garage at the southwest corner * * * will be a nuisance, distinctly prejudicial to the welfare, comfort, safety and peace of the persons residing in the immediate vicinity, to those attending school and to those worshipping in the said churches".

A distinction is drawn between a garage and a filling station; and an injunction on practically a similar state of facts was denied, in *City of Electra v. Cross*,¹⁸ where a filling station was being erected at the intersection of the most populous streets of the city. In line with this distinction an ordinance prohibiting the erection of a filling station between certain streets in the most exclusive part of a city was held void as arbitrary and unreasonable.¹⁹ The erection of a public garage may possibly have caused a different decision, the dissenting opinion in the case being very strong. One more impression of the general viewpoint of the courts may be obtained from the fact that a restriction against using property "for any offensive purpose or occupation" has been held to include a public garage.²⁰

J. A.

INTERVENING IMPOSSIBILITY OF PERFORMANCE AS A DEFENSE FOR BREACH OF CONTRACT.—As a general principle, it has often been stated that the intervening impossibility of performance of a

¹⁶ *People v. Stroebe*, 209 N. Y. 434, 103 N. E. 735 (1913).

¹⁷ (Pa.), 101 Atl. 826 (1917).

¹⁸ (Tex.), 225 S. W. 795 (1920).

¹⁹ *Standard Oil Co. v. City of Kearney* (Neb.), 184 N. W. 109 (1921).

²⁰ *Hibberd v. Edward*, 235 Pa. 454, 84 Atl. 437 (1912); *Hohl v. Modell* (Pa.), 107 Atl. 885 (1919).

contract will not excuse from liability. However, several important considerations arise which greatly qualify such a broad statement and make it profitable to trace the development of the law upon this interesting point.

One of the earliest decisions on the subject and that universally accepted as having laid down the general rule applicable is that of *Paradine v. Jane*,¹ an English case decided in 1647. The court in holding the defendant liable for a breach of contract said, " * * * when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

The rule as here enunciated was followed and applied in all of its strictness and rigor until about the middle of the eighteenth century. At that time the courts both of England² and of the United States, moved chiefly by the inequitable results often following a strict adherence to the rule, admitted so-called exceptions. This relaxation was allowed upon the theory that it was an implied condition of the contract that subsequent impossibility of performance caused by certain circumstances was to excuse and that, when a party to a contract was thus held not to be liable, the intentions of the contracting parties was merely being given effect.³

By reason of the application of this theory, the courts in three classes⁴ of cases have excused non-performance: first, where, subsequent to the making of the contract, there is a change of law which makes performance legally impossible;⁵ second, where an agreement has been made to perform personal services and before time of performance death or sickness overtakes the party who was to perform;⁶ third, where the continued existence of the subject matter of the contract is essential to its performance and, before the time for performing, the subject matter is destroyed by inevitable accident without fault on the part of the obligor.⁷

Thus it would appear that the rule as enunciated in *Paradine v. Jane*, should now be applicable only where there is an absolute and unqualified contract. But to determine whether the contract

¹ Aleyn 26 (1647).

² *Taylor v. Caldwell*, 3 B. & S. 826 (1863).

³ *Taylor v. Caldwell*, *supra*.

⁴ The court in *Kinzer Construction Co.* applied a fourth exception, holding that non-performance was excused where conditions essential to performance did not exist. This exception has not gained general recognition. *Kinzer Construction Co. v. State* (N. Y.), 125 N. Y. Supp. 46 (1910).

⁵ *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430 (1878); *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350 (1892).

⁶ *Blakely v. Sousa*, 197 Pa. 305, 47 Atl. 286, 80 Am. St. Rep. 821 (1900); *Brown v. Fairhall*, 213 Mass. 290, 100 N. E. 556, 45 L. R. A. (N. S.) 349 (1913) and note.

⁷ *Virginia Iron & Coke Co. v. Graham*, 124 Va. 692, 98 S. E. 659 (1919), and cases therein cited; *The Claveres*, 264 Fed. 276 (1920).

involved is absolute and unqualified or is subject to the so-called exceptions is sometimes very difficult. In any event, it is clear that the form of the contract is not alone to govern, but it must be considered in connection with the subject matter to which the contract relates, and with the situation of the parties at the time of contracting.⁸ A very efficient test but one which only applies to the case where the continued existence of the subject matter is essential to performance was laid down in *Taylor v. Caldwell*.⁹

The court there said:

"* * * where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

The statement above quoted, of course, only covers the case where the continued existence of the subject matter is essential to performance but it sets forth the reasoning adopted by the vast majority of courts in allowing the other two so-called exceptions to be applied. If it appears that the parties contemplated that the party to furnish personal services should remain in good health, that the contract should remain legally performable, or that the subject matter should continue to exist, then this will be read into the contract as an implied condition and non-performance on such a ground will be excused. As an aid in this matter the courts have sought to arrive at the implied intentions of the parties by determining whether the obligor could *reasonably* have anticipated the intervening impossibility and guarded against it. If he could have so anticipated it but did not, he is held liable;¹⁰ if not, then non-performance is excused. Thus we can see that each case is judged from its own circumstances.

In the recent case of *Cohen v. Morneault*,¹¹ the defendant con-

⁸ *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371 (1857).

⁹ *Taylor v. Caldwell*, *supra*.

¹⁰ *Mitchell v. Hancock Co.*, 91 Miss. 414, 45 So. 571, 15 L. R. A. (N. S.) 833, 124 Am. St. Rep. 706 (1908); *Carter v. Wilson*, 102 Kan. 200, 169 Pac. 1139 (1918); *Prather v. Latshaw (Ind.)*, 122 N. E. 721 (1919); *Western Drug, etc., Co. v. Board of Adm. of Kansas (Kan.)*, 187 Pac. 701 (1920).

¹¹ (Me.) 114 Atl. 307 (1921).

tracted to ship to the plaintiff a carload of potatoes of a certain description. While in transit, the goods were destroyed by fire without the defendant's fault. In holding the defendant liable for non-performance, the Court said:

"In the pending case the agreement was not to sell and convey a particular car of potatoes, but a car of any potatoes answering a certain description. The contract contained no condition express or implied. The defendant made an unqualified agreement. He failed to perform it. The destruction of a car of potatoes did not render its performance impossible."

Here it may be seen that none of the so-called exceptions are applicable. The contract in its terms, judging from the surrounding circumstances, was absolute and unqualified. The circumstance causing the non-performance was such as could have been anticipated and guarded against. At most, it could only be said that the performance was made more difficult and would work some hardship upon the defendant. But it is well settled that this constitutes no defense.¹² It thus appears that the holding of this recent case is eminently sound.

J. B. S.

¹² *Piaggio v. Somerville*, 119 Miss. 6, 80 So. 342 (1919).